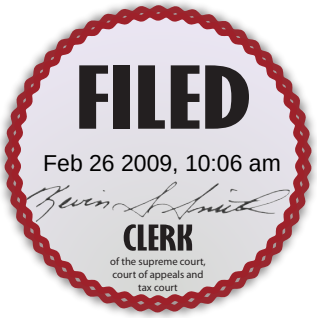

ATTORNEYS FOR APPELLANT:

SUSAN K. CARPENTER
Public Defender of Indiana

C. BRENT MARTIN
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

AMANDA J. COOPER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0808-PC-475
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0710-PC-476

February 26, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Amanda J. Cooper ("Cooper") appeals the Madison Circuit Court denial of her petition for post-conviction relief. On appeal, Cooper argues that the post-conviction court erred in finding that Cooper failed to establish ineffective assistance of trial counsel.

We affirm.

Facts and Procedural History

On direct appeal, the facts were set forth as follows:

> On January 17, 2002, Cooper, Cooper's boyfriend Michael Martin, Amy Whittaker, and Amanda Horton were at a bar in Anderson, Indiana. John Miller, a sixty-three-year old man, was also in the bar and bought Whittaker and Horton some drinks. Over the course of the evening, Horton, Whittaker, and Martin became aware that Miller was carrying a large amount of cash, and talked about robbing Miller. Cooper was sitting at the table while these discussions occurred. George Chapman, a taxi driver who knew Miller and Martin, overheard the discussions, but was unable to specifically identify Cooper as making any statement concerning the robbery.
>
> At approximately 3:00 a.m., Cooper, Martin, Whittaker, Horton, and Miller left the bar. Miller started to walk home, but Whittaker and Horton caught up with Miller and convinced him to go with them. Cooper and Martin drove in Cooper's van to the residence of Horton's sister, Brenda Scott. Whittaker, Horton, Miller, and Cooper's friend Michelle Copeland followed in Whittaker's car. Scott was not home, but Scott's thirteen-year-old daughter overheard Cooper tell Whittaker and Horton, "He was an elderly man. He didn't need to lose his life over money and they didn't need to do it because they all had kids and she was pretty serious about it. I mean she had tears in her eyes. . . ." When Scott arrived, Cooper, Martin, and Copeland left in her van to go to Horton's apartment after stopping by Cooper's house to retrieve some marijuana. Again, Whittaker, Horton, and Miller followed in Whittaker's car.
>
> As Cooper, Copeland, and Martin arrived at Cooper's house, Copeland said she was hungry and wanted to get something to eat. When Martin exited Cooper's van, Cooper told him that she was not "doing none of it." She later told police that she "thought they were going to manhandle [Miller] and take his money." After Cooper and Copeland left to go to a nearby Village Pantry, Whittaker, Horton, and Miller exited from the second vehicle and started to walk toward Cooper's house. Martin

> approached Miller from behind a garage and repeatedly struck Miller in the face. After Miller fell down, the three started kicking Miller until he was unconscious. Martin took Miller's wallet, and the three divided Miller's money among them—Martin took $60.00 and Horton and Whittaker each took $40.00. Miller ultimately died from twelve blunt-force injuries to his head.
>
> Approximately fifteen minutes later, Cooper and Copeland returned from the Village Pantry and saw Miller lying in the alley. Cooper drove to Horton's house and confronted Martin about what had happened. Martin was in the bathroom washing blood from his hands. Copeland asked Cooper to drive her home. After Cooper took Copeland home, Cooper drove to her neighbor's house to call 9-1-1. Initially, when the police arrived, Cooper denied knowing Miller, but in a second interview, implicated Horton and Whittaker. Cooper later gave a statement implicating Martin, Horton, and Whittaker.
>
> On January 25, 2002, the State charged Cooper with robbery, false informing, and Conspiracy to Commit Robbery, a Class B felony. On August 11, 2003, the State amended the charging information to include a fourth count, felony murder. On September 16, 2003, a jury trial commenced. After the State rested, the trial court entered directed verdicts for the conspiracy to commit robbery and felony murder counts. The jury convicted Cooper on the remaining charges.

Cooper v. State, 48A02-0312-CR-1064, slip op. (Ind. Ct. App. Aug. 10, 2004) (record citations omitted).

On direct appeal, we affirmed Cooper's robbery conviction and reversed the trial court's directed verdict on the felony murder count. On January 30, 2006, Cooper filed a pro se petition for post-conviction relief. On October 3, 2007, counsel for Cooper filed an amended petition. On November 29, 2007, the post-conviction court held a hearing. On June 19, 2008, the post-conviction court denied Cooper's petition. Cooper appeals.

Standard of Review

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. McCary v. State, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners

a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. Davidson v. State, 763 N.E.2d 441, 443 (Ind. 2002). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5) (2006); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

The post-conviction court entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6) (2006). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error –'that which leaves us with a definite and firm conviction that a mistake has been made.'" Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quoting State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997)). Although we accept findings of fact unless they are clearly erroneous, we give conclusions of law no deference. Fisher, 810 N.E.2d at 679.

Discussion and Decision

Cooper claims that she was denied effective assistance of trial counsel.

> Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

> been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."
>
> Appellate review of the post-conviction court's decision is narrow. We give great deference to the post-conviction court and reverse that court's decision only when "the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court."
>
> Although the two parts of the Strickland test are separate inquires, a claim may be disposed of on either prong. Strickland declared that the "object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted). Moreover, we presume that counsel provided adequate assistance, and we give deference to counsel's choice of strategy and tactics. Smith v. State, 765 N.E.2d 578, 585 (Ind. 2002). "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Id.

Cooper argues that her trial counsel provided ineffective assistance by failing to tender jury instructions and argue for the lesser-included offense of Class C felony robbery. At the post-conviction hearing, trial counsel testified that the strategy at trial was to argue that Cooper had no knowledge that the Class A felony robbery was to occur. PCR Tr. p. 12. To tender jury instructions for lesser-included offenses would have been inconsistent with this theory.

Under similar circumstances, our supreme court has held:

> The record contains numerous indications that trial counsel made the decision not to tender lesser include offenses as part of an "all or nothing" trial strategy. It is well-established that trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. Garrett v. State, 602 N.E.2d 139, 142 (Ind. 1992). This is

> so even when "such choices may be subject to criticism or the choice ultimately prove detrimental to the defendant." Id.
>
> Further, this Court has previously held that a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense. Page v. State, 615 N.E.2d 894, 895 (Ind. 1993). In Page, we concluded: "It is not sound policy for this Court to second-guess an attorney through the distortions of hindsight." Id. at 896. There is no reason to stray from this policy.

Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). Similarly, Cooper's trial counsel's tactical decision not to tender an instruction on lesser-included offenses does not constitute ineffective assistance of trial counsel. See, id.

Affirmed.

BAILEY, J., and BARNES, J., concur.